

Broadley v Matros

2019 NY Slip Op 32166(U)

July 9, 2019

Supreme Court, New York County

Docket Number: 805220/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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EDMUND BROADLEY,

INDEX NO. 805220/14

Plaintiff,

-against-

EVAN MATROS,

Defendant.

-----X

JOAN A. MADDEN, J.:

In this action alleging medical malpractice and lack of informed consent, defendant moves for summary judgment dismissing the complaint against him. Plaintiff, appearing *pro se*, opposes the motion.

Background

This action arises out of a anterolateral thigh ("ALT") flap reconstruction surgery performed by defendant, a plastic surgeon, at Memorial Sloan Kettering ("Memorial") on January 31, 2012. Plaintiff alleges that the surgery was contraindicated, unnecessary and improperly performed, and maintains that defendant should have performed one of three other options to the ALT flap reconstruction surgery: (1) primary suture closing, (2) rectus abdominis flap or (3) free flap. Plaintiff also asserts a claim for lack of informed consent based on allegations that he "would not have agreed to any surgical procedure on his leg that in any way posed a threat to his mobility."

The ALT flap reconstructive surgery was performed following a surgery performed to remove a sarcoma from plaintiff's left groin area on the same date. The sarcoma was diagnosed in October 2011 based on a biopsy, after which plaintiff was advised that the best treatment

would be radiation followed by surgery. On December 8, 2011, plaintiff consulted with Dr. Samuel Singer at Memorial regarding the surgery. Dr. Singer testified that he recommended that plaintiff have the surgery to remove the tumor three to five weeks after completion of radiation, that he discussed the risk of lymphedema with surgery and noted that plaintiff understood the risk of the surgery and wanted to proceed (Singer EBT at 191-192). Plaintiff completed radiation therapy on December 9, 2011.

On January 12, 2011, plaintiff met with defendant regarding the plastic surgery to reconstruct the area following the resection of the tumor. Plaintiff testified at his deposition that at this meeting, defendant told him of the four reconstructive options to close the wound after Dr. Singer removed the tumor: simple suture closing, rectus abdominis flap, free flap, and the ALT procedure, and how each procedure would be performed (Plaintiff's EBT at 103-104). Plaintiff also testified that defendant informed him of the risks associated with an ALT flap reconstruction, including permanent numbness in the left thigh and intermittent shooting pains throughout the thigh (Id at 106). He also testified that defendant told him that the decision of which procedure would be performed would be made by defendant intra-operatively (Id at 105-106). Following these discussions, plaintiff signed a consent form authorizing defendant to perform left groin reconstruction (Id at 116-117; Exhibit H at 152).

Plaintiff met with defendant again January 26, 2012, to discuss the different types of closures. Plaintiff testified that during this consultation defendant "[w]ent over the exact information that we went over the previous time just to make sure we understood where we were at. I told him my priorities and preferences in terms of how the surgery should be done; that the [ALT] flap surgery was my last choice" (Id at 118). Plaintiff, however, also testified that it was

his understanding from the January 12, 2012 meeting with defendant that defendant would attempt primary suture closure but if he was unable to do so, he would have to try the other options which included a ALT flap (Id at 105-106). Plaintiff also testified that he told defendant that he did not want a procedure performed that would “even potentially jeopardize” his mobility (Id at 108).

At his deposition, defendant testified that he informed plaintiff of the risks associated with the ALT flap reconstruction, and the alternative treatments including no treatment, and the risks associated with each alternative. (Defendant EBT at 20, 66-68). He also testified that the benefit of the ALT flap reconstruction was to fill the defect left by the surgery and that he could only determine which reconstruction option to perform after Dr. Singer removed the mass and he was able to inspect the defect (Id at 92).

On January 31, 2012, Dr Singer performed a “radical resection of the left groin synovial sarcoma.” The operative report states:

the entire left groin and left thigh were circumferentially prepped and draped in usual fashion. I made a[n] elliptical incision around the prior incision site. The prior incision was about 10 cm in length. This made an incision about 16 cm in overall length and about 2 cm on either side of the incision taking about a 4 cm segment of skin x 16 cm long.

(Exhibit H at 490).

The pathology report states that the left inguinal synovial sarcoma specimen consisted of one irregular fragment of adipose tissue that had an overall measurement of 14.1 x 13.5 x 4.8 cm, and a mass that measured 4.5 x 3.8 x 2.5 cm. (Id at 527).

Following the removal of the tumor, defendant performed the ALT surgery. Defendant stated in his operative report that, “[b]ased on the nature of the defect, a[n] [ALT] flap was

indicated to cover vessels, replace skin and obliterate dead space." Id at 492.

In this action, plaintiff asserts that as a result of the ALT surgery, he sustained injuries, including that he is unable to sit for an extended period of time, difficulty walking and bending, extreme tightness in left thigh, pain, feeling of a metal rod in left thigh, constant aching, and painful distribution of weight on his left leg.

Defendant's Summary Judgment Motion

Defendant moves for summary judgment, arguing that plaintiff cannot establish that there was any departure in the standard of care or a causal connection between defendant's care and treatment and plaintiff's alleged injuries, and that plaintiff cannot establish lack of informed consent. In support of his motion, defendant submits, inter alia, the expert affirmation of Dr. Alan M. Engler, MD., a board certified plastic surgeon, the medical records, and the transcripts of plaintiff's deposition testimony and defendant's deposition testimony.

In his affirmation, Dr. Engler opines that upon his review of the allegations in the Bill of Particulars, the pertinent medical records and deposition transcripts and based on his experience in the field of plastic surgery, that within a reasonable degree of medical certainty, defendant's "intra-operative decision to perform an ALT flap reconstruction was proper," noting that plaintiff testified he had no physical complaint before the surgery, had no edema of the extremities and a normal lymphatic examination such that there were no contraindications to performing the surgery (Engler Aff ¶ 39).

He further opines that "[g]iven the size of the defect in the groin, plaintiff's weight, medical history of radiation and 30 year history of smoking,...within a reasonable degree of medical certainty, the flap reconstruction was unavoidable" (Id ¶ 40). He also opines that

defendant's "clinical judgment not to perform a primary suture closing was proper and within the standard of care [and that]...wound breakdown would likely have been inevitable" and that, as noted by defendant in the operative report, a primary suture closing was not performed because "skin edges required a moderate amount of tension" (Id ¶ 41). Accordingly, he opines that performing this type of closing "risked life-threatening problems for plaintiff given the risk of rupturing vessels" (Id).

He further opines that defendant used "good and proper surgical technique" in performing the reconstruction with an ALT flap, which involved taking a flap from plaintiff's left thigh, with the blood supply maintained, and tunneling the flap into the defect in plaintiff's left groin (Id ¶ 42). He states that defendant "properly positioned and closed the areas in layers after hemostasis was obtainedtailored the ALT skin island flap to meet the groin defect perfectly and then sutured the area (Id). He further states that the record supports that defendant used good and proper technique since plaintiff's left thigh donor site and left groin healed properly and without infection.

Dr. Engler also opines that defendant acted within the standard of care in performing the ALT flap rather than the rectus abdominal flap (involving the transfer of tissue from the abdominal wall, which includes the rectal muscle) and free flap (involving the transfer of a piece of tissue with the blood supply disconnected and circulation reestablished at site). With respect to the rectus abdominal flap, Dr. Engler opines that the procedure has many additional risks, particularly for a patient like plaintiff, including abdominal weakness, an abdominal hernia, the necessity of a skin graft, the likelihood that the flap will not match the recipient area and scarring to the abdomen area. As for the free flap, Dr. Engler opines that free flap had a greater risk of

failing than the ALT flap, particularly with a patient like plaintiff with a long history of smoking since smokers are at risk of small vessel disease, and that the “ALT flap is less invasive, safer, and a shorter procedure” (Id ¶ 44).

With respect to the issue of informed consent, Dr. Engler opines that defendant “acted well within the standard of care when he fully informed plaintiff of the reasons for the ALT flap... how the procedure would be performed, as well as the risks...the benefit ...and possible alternatives...of the ALT flap procedure. [Defendant] further explained to plaintiff that because he did not intend on taking a significant amount of muscle with the ALT flap, he believed plaintiff’s function would be relatively preserved” (Id ¶ 48).

As for causation, Dr. Engler opines that:

all of plaintiff’s physical complaints in this lawsuit ... are the known sequelae of lymphedema (i.e. swelling due to lymphatic system blockage), which is the result of plaintiff having undergone radiation and surgical resection of the cancerous mass. To whatever degree plaintiff has lymphedema, there is no basis to say that the ALT flap reconstruction was the cause. Indeed, plaintiff does not dispute that he was advised both radiation and surgical excision of the mass (particularly if the surgery involved the lymphatic system and nodes) are known to cause lymphedema. Accordingly, it is my opinion, within a reasonable degree of medical certainty that nothing [defendant] did or did not do when he performed the ALT flap reconstruction proximately cause plaintiff’s injuries attributable to lymphedema [and that]... plaintiff would have developed lymphedema regardless of the type of reconstruction performed by [defendant].

(Id ¶ 51).

Plaintiff opposes the motion, arguing that defendant has failed to make a prima facie showing that he is entitled to summary judgment dismissing his medical malpractice claim, as the medical records relied on by defendant are not certified and thus should not be considered. Plaintiff also argues that defendant’s expert affirmation is based on erroneous facts, including

that the tumor was removed from plaintiff's leg when, in fact, it was removed from his groin, and that his hypothesis that plaintiff's injuries are caused by lymphedema is contrary to plaintiff's medical records, and defendant's deposition provides a more plausible theory. Plaintiff does not submit an affirmation from an expert, asserting that he was not given an opportunity to have his case reviewed by an expert witness.

As for his claim of lack of informed consent, plaintiff argues that defendant has not meet his burden as to this claim since there are no written consultation reports for two of the pre-operative consultations, the consent form does not list any side effects or risks particular to ALT flap surgery, and the facts regarding defendant's explanation of the risk of the surgery are based on deposition testimonies of plaintiff and defendants. In addition, plaintiff notes that the third pre-consultation which occurred on January 26, 2012, was not signed until February 2, 2012, or two days after the January 31, 2012 surgery.

Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. Expert opinion must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403,

404 (1st Dep't 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dep't 2003)).

In this case, defendant has made a prima facie showing entitling him to summary judgment based on the opinion of Dr. Engler, which is supported by the medical records and deposition testimony, that defendant did not depart from the standard of care in connection with the ALT flap reconstruction surgery and that plaintiff's alleged injuries were not proximately caused by the surgery. As for plaintiff's argument that the medical records from Memorial should not be considered as they are uncertified, this argument is unavailing since although defendant failed to attach the certification page within Exhibit H, plaintiff has not asserted that the records are inaccurate or incomplete. Furthermore, as noted by defendant in reply, plaintiff cannot claim any prejudice since, as found by the court's decision and order dated June 27, 2018, a certified copy of Memorial's medical records were provided to plaintiff during discovery.

Accordingly, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325. "The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified ...[and] [a]t least some statement of medical expertise in rebuttal [is] required in order to defeat defendant's motion for summary judgment." Neuman v. Greenstein, 99 AD2d 1018, 1018 (1st Dept 1984); see also, Bacani v. Rosenberg, 74 AD3d 500, 502 (1st Dept), lv denied 15 NY3d 708 (2010)(holding that "[o]nce a medical malpractice defendant has established the absence of any departure from good and accepted medical practice causing injury, a plaintiff in opposition must

submit a physician's affidavit of merit attesting to a departure from accepted medical practice and containing the attesting doctor's opinion”).

Here, as plaintiff fails to submit an expert affirmation to support his position that the ALT flap reconstruction surgery was contraindicated and that one of the three other options should have been performed, his opposition is insufficient to raise a triable issue of fact as to whether defendant departed from the applicable standard of care.¹ As for causation, while plaintiff argues that medical records and defendant’s testimony shows that he did not suffer from lymphedema, as opined by Dr. Engler, and that his injuries, including the feeling of tightness in his thigh, was caused by ALT surgery and, in particular the straight line closure used by defendant, in the absence of expert opinion to support this argument, it is insufficient to raise an issue of fact. In any event, in the absence of evidence that defendant departed from the standard of care in connection with the ALT surgery, plaintiff’s assertions that he was injured as a result of such surgery are insufficient to defeat defendant’s motion for summary judgment.

With regard to the claim of lack of informed consent that court notes that “[l]ack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation” (Public Health Law § 2805-d[1]). To prevail on a claim for lack of informed consent “it must ... be

¹Plaintiff, whose attorney was permitted to withdraw as counsel in October 2017, asserts that he contacted seven expert referral companies but none of the companies contracted for services with an unrepresented litigant. The court notes that after plaintiff’s counsel withdrew plaintiff was given numerous adjournments to allow him an opportunity to obtain new counsel.

established that a reasonably prudent person in the patient's position would not have undergone the treatment ... if [she] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought” (Public Health Law § 2805-d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009). In this case, defendant has met this burden based on the consent form, which was signed by plaintiff and defendant, and states that plaintiff consented to “left groin reconstruction surgery,” that defendant explained to him the risks of the treatment, and that he had an opportunity to ask questions and that such questions had been answered to his satisfaction, and that he was informed of the benefits and alternatives to the procedure. In addition, defendant’s expert opines that defendant acted within the standard of care with respect to informing plaintiff of the risks, benefits, and alternatives to the ALT flap reconstruction.

Accordingly, to controvert this showing, the plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, and (2) a reasonable person in plaintiff’s position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805-d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). “Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff.” Orphan v. Pilnik, 15 NY3d at 908.

In this case, plaintiff has failed to raise a triable issue of fact as to defeat summary

judgment as he has not provided any expert testimony to controvert defendant's showing that the information disclosed before obtaining consent to the operation was sufficient. See Ramos v. Weber, 118 AD3d 408, 409 (1st Dept 2014), lv dismissed 26 NY3d 1127 (2016)(finding that plaintiff "failed to rebut defendants' showing that she was properly informed of the surgical procedure and the alternatives, as well as the reasonably foreseeable risks and benefits, by tendering expert testimony proving the insufficiency of the information the defendant doctor disclosed to her"). Moreover, contrary to plaintiff's position, that the consent form did not document the specific alternatives and risks of the ALT flap surgery does not raise an issue of fact as to whether informed consent to the surgery was obtained, particularly in light of uncontroverted evidence that defendant discussed such alternatives and risks with plaintiff. Nor does any assertion by plaintiff as to the insufficiency of documentation as to the pre-treatment consultations with defendant provide a basis for defeating summary judgment.

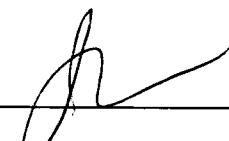
Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

DATED: July 9, 2019



J.S.C.

HON. JOAN A. MADDEN
J.S.C.